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IN THE

Supreme Court of the United States

October Term, 1963

No. 660

SEATTLE BUILDING AND CONSTRUCTION TRADES COUNCIL, an association, and JAMES K. BENDER, EUGENE V. NELSON and JOHN DOE,
Petitioners,

v.

RUSTY ROSLING and JACK BEHAR,
Respondents.

BRIEF FOR RESPONDENTS IN ANSWER TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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To the Supreme Court of Washington

REASONS FOR DENYING THE WRIT

1. Jurisdiction

In discussing the question before the Court, a short statement of the salient facts should first be made. Respondents were engaged in doing certain construction work on an apartment and commercial building which they leased and operated (R. 17). To perform this work, Respondents hired approximately 25 men, none of whom were members of petitioner, Seattle Building & Construction Trades Council (R. 17). There was no quarrel between the Respondents and their non-union employees concerning the wages paid or the working conditions (R. 18). Petitioner placed a picket on the construction project who patrolled in front of Respondents' premises carrying a sign protesting substandard wages and conditions, (R. 19). Although Respondents' employees ignored

the picketing and continued working, certain construction suppliers and truck drivers delivering construction supplies observed the picketing and ceased to deliver (R. 19, 20). Commercial tenants on the ground floor of Respondents' building complained and demanded that the pickets be removed (R. 20).

Upon facts stipulated to by counsel for the respective parties, the trial court found that the conduct of Petitioners was coercive in nature and should be restrained (R. 28). On appeal, the Washington Supreme Court refused to consider the question of whether or not the picketing had been properly enjoined. It held that if the construction was completed, this question was moot (R. 33). A fact that particularly should be noted appears in the stipulation as follows (R. 20):

> "The value of construction materials annually purchased by the plaintiffs for use in Behar Construction Company activities, from sources directly and indirectly outside of the State of Washington, does not exceed the sum of $50,000."

The court has requested Respondents to distinguish its recent decision in *Liner, et al., v. Jafco, Inc., et al.*, No. 43, October Term, 1963, from the instant case. There, the Chattanooga Building Trades Council, AFL, placed a picket on a shopping center construction site to protest the lower than union scale wages paid by the general contractor to its non-union employees. In response to the picket, the construction workers ceased work. The respondent, Jafco, Inc., obtained an injunction from the Tennessee Chancery Court, despite Petitioner's motion to have it dissolved on the ground that the subject matter

of the picketing was exclusively within the jurisdiction of the National Labor Relations Board. The construction of the shopping center was completed pending the decision on appeal. In view of this fact the Court of Appeals of Tennessee held that the questions in controversy had become moot and further agreed with the lower court's finding that the matter was properly within the jurisdiction of the state courts (49 L.R.R.M., 2585). This Court held that it had jurisdiction to review the Tennessee court's decision, stating at page 8 of the opinion as follows:

> "... local rules which purport to preclude state appellate court adjudication of the federal preemption claim cannot conclusively render the case moot for purposes of this Court's review."

On the merits the Court held:

> "We hold that the issuance of the injunction was beyond the power of the Tennessee courts and therefore reverse the judgment."

An obvious distinction between that case and the present one is that in *Liner*, the respondent contractor purchased outside and brought into the state materials costing $147,099.67 which far exceeds the minimum monetary standards set by the National Labor Relations Board for the exercise of its jurisdiction. However, in the instant case the value of construction materials involved in interstate commerce was less than $50,000.00 (R. 20), thus below the National Labor Relations Board jurisdictional limit. Therefore, the National Labor Relations Board would not have exercised jurisdiction over this dispute even if an application for relief had been made to the Board. Petitioners herein have never asserted federal preemption as a de-

fense; nor could they, since this dispute is properly within the jurisdiction of the state court. (See page 10 of Petition.) The Court's concern in the *Liner* case was over the Tennessee court's usurpation of jurisdiction from a federal regulatory agency in a situation where federal law clearly preempted the field. Federal preemption is not present here. The present case is not an example as was *Sola Electric Co. v. Jefferson Electric Co.*, 317 U.S. 173, 176, of an area of judicial decision "within which the policy of the law . . . so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes."

A further distinction between *Liner v. Jafco, Inc., supra*, and the instant case is that in the former, the Court of Appeals of Tennessee, Eastern District, affirmed the lower court's finding that a labor dispute did not exist. Therefore, the Tennessee Appellate Court made a determination of the federal question that was presented throughout that controversy. Clearly, the Tennessee Appellate Court made a determination of the federal question which is a jurisdictional requirement essential to this Court's review of the Tennessee Court of Appeals' decision. In the instant case, however, the Washington Supreme Court decided only that if the construction was completed, the case was moot and declined to consider the federal question presented in this case (R. 35). Although the federal issues involved in this instant case were asserted on appeal before the State Supreme Court, that court made no determination of the question.

Petitioners herein pray that a Writ of Certiorari issue

to review the decision of the Washington State Supreme Court. The petition should be denied because the Washington Supreme Court made no determination of the federal question. This Court has held that it cannot consider a Writ of Error directed to a state appellate court where the state court has refused to exercise jurisdiction and has dismissed the appeal. *Western Union v. Hughes*, 203 U.S. 505; *Randall v. Board of Commissioners*, 261 U.S. 252. If in the instant case a Writ of Certiorari is issued as prayed for by Petitioners, the only question subject to review is the Washington Supreme Court's finding of mootness which involves only a rule of local law.

In the case of *Wolfe v. North Carolina*, 364 U.S. 177, 197, this Court stated:

> "The North Carolina Supreme Court did not decide this asserted federal question. We have found that it did not do so because of the requirements of rules of state procedural law within the constitutional power of the state to define, and here clearly delineated and even handily applied. We have no choice but to determine that this appeal must be dismissed because no federal question is before us."

In light of the mentioned distinctions, *Liner v. Jafco, Inc.*, *supra*, is not controlling the instant case. Here the State Supreme Court has applied a long-established rule limiting the exercise of its appellate jurisdiction. Such a determination has received the approval of the United States Supreme Court. As stated in *John v. Paullin*, 231 U.S. 583, 585:

> "Without any doubt it rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise, and the

> state law and practice in this regard are no less applicable when federal rights are in controversy than when the case turns entirely upon questions of local or general law."

Petitioners do not assert nor is there a basis for claiming that the State Supreme Court determined the issues moot in order to avoid deciding a constitutional question. When a state court decides a case "upon grounds that have no relation to any federal question, this court accepts the decision, whether right or wrong." *Nickel v. Cole*, 256 U.S. 222, 225. In the instant case there is no indication that the State Supreme Court's decision that if the construction was completed, the case was moot, was in any way connected with or dependent upon a federal question. With regard to the reviewability of a state court's decision based upon independent state law, this Court stated in *Herb v. Pitcairn*, 324 U.S. 117, 125, 126, as follows:

> "This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds (cases cited). The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion."

2. Coercive Standard Previously Reviewed by This Court

In granting the injunction the trial court stated in effect that injunctive rights are limited to situations where there are no labor disputes and where the picketing is against state public policy (R. 37, 28). It is evident from the memorandum opinion that the trial judge understood that the state public policy requires that picketing be enjoined when it ceases to be persuasive only and becomes coercive. The State of Washington's public policy that picketing may be enjoined when the effect, in situations where there is no labor dispute, becomes coercive in nature, has been review by this Court in two decisions as recently as 1950. *International Brotherhood v. Hanke*, 339 U.S. 469; *Building Service Union v. Gazzam*, 339 U.S. 531. In *International Brotherhood v. Hanke*, *supra*, this Court stated at page 473 as follows:

> "Here, as in *Hughes v. Superior Court*, 339 U.S. 460, ante, 985, 70 S. Ct. 718, we must start with the fact that while picketing has an ingredient of communication it cannot dogmatically be equated with the constitutionally protected freedom of speech. Our decisions reflect recognition that picketing is indeed a hybrid' (cases cited). The effort in the cases has been to strike a balance between the constitutional protection of the element of communication in picketing and the power of the state to set the limits of permissible contest open to industrial combatants."

With reference to the undermining of union standards this Court continued, 339 U.S. 475:

> "Unions obviously are concerned not to have union standards undermined by non-union shops. This interest penetrates into self-employer shops. On the other hand, some of our profoundest thinkers from

> Jefferson to Brandeis have stressed the importance to a democratic society of encouraging self-employer economic units as a counter-movement to what are deemed to be the dangers inherent in excessive concentration of economic power. 'There is a widespread belief . . . that the true prosperity of our past came not from big business, but through the courage, the energy and the resourcefulness of small men . . . and that only through participation by the many in the responsibilities, and determinations of business can Americans secure the moral and intellectual development which is essential to the maintenance of liberty.'"

CONCLUSION

In contrast to *N. L. Liner, et al. v. Jafco, Inc., et al.*, No. 43, October Term, 1963, Petitioners herein do not contend that this controversy is outside the jurisdiction of the Washington courts. In fact, Petitioners admit that federal preemption does not apply since Respondents' purchases of supplies and materials did not meet the dollar value jurisdictional standards of the National Labor Relations Board. Therefore, since the Superior Court properly exercised jurisdiction, the State Supreme Court's finding of mootness should be regarded as a proper application of local law and a final disposition of the case.

Respectfully submitted,

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